Supreme Court, U.S.
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No. 91-1517

In the Supreme Court of the United States

OCTOBER TERM, 1991

DALE M. BREGNARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior convictions for assault and battery qualified as "violent felon[ies]" for purposes of sentence enhancement under 18 U.S.C. 924(e).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 951 F.2d 457.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1991. The petition for a writ of certiorari was filed on March 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the District of Rhode Island, petitioner was convicted of illegally possessing a firearm after a felony conviction, in violation of 18 U.S.C. 922(g)(1).

He was sentenced to 15 years' imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. Pet. App. 1-10.

1. Police officers arrested petitioner at a bar in Warren, Rhode Island, after they found a fully loaded, nine-millimeter, semi-automatic pistol concealed in a shoulder holster beneath petitioner's jacket. A federal grand jury subsequently returned an indictment charging petitioner with illegally possessing a firearm after a felony conviction. 18 U.S.C. 922(g)(1). The government later filed an information charging that petitioner had four prior convictions for violent felonies and therefore qualified for sentence enhancement under 18 U.S.C. 924(e).[1] The government pointed to petitioner's 1974 robbery conviction, his 1974 nighttime breaking and entering conviction, and his 1976 and 1985 assault and battery convictions. Pet. App. 2-3.[2]

Before sentencing, petitioner filed a motion arguing that three of the predicate convictions—the two

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[1] Section 924(e)(1) provides that if a person who violates Section 922(g) has three previous "violent felony" convictions, he shall be subject to a mandatory minimum 15-year sentence. 18 U.S.C. 924(e)(1). Section 924(e)(2)(B) defines a "violent felony" to include any crime punishable by imprisonment for a term exceeding one year that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) * * * involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B).

[2] Petitioner had pleaded guilty to assault and battery charges under a Massachusetts statute providing that "[w]hoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of corrections or by a fine of not more than five hundred dollars." Mass. Ann. Laws ch. 265, § 13A (Law. Co-op. 1980). See Pet. App. 6.

assault and battery convictions and the breaking and entering conviction—did not constitute "violent felon[ies]" within the meaning of Section 924(e). At sentencing, the district court relied on the descriptions of the assault and battery offenses in the presentence report to find that those offenses qualified as violent felonies. The presentence report indicated that each involved a threat or use of physical force on another. Pet. App. 3, 8.[3]

2. The court of appeals affirmed the district court's decision. The court of appeals recognized that the Massachusetts courts have construed the relevant assault and battery statute, Mass. Ann. Laws ch. 265, § 13A (Law. Co-op. 1980), to cover both physically harmful touchings and offensive nonconsensual touchings involving no risk of physical harm. See *Commonwealth* v. *Burke*, 457 N.E.2d 622, 624 (Mass. 1983). The court of appeals accordingly concluded that one "must look beyond the statute to determine whether the assault and battery convictions involved crimes which had 'as an element the use, attempted use, or threatened use of physical force against the person of another.' " Pet. App. 7, quoting 18 U.S.C. 924(e)(2)(B)(i).

The court of appeals reviewed the presentence report's account of the assault and battery convictions, observing that petitioner had not objected in the district court "to the factual narrative of his prior con-

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[3] Although the court did not specifically rule on whether the breaking and entering conviction qualified as a violent felony, it suggested that the issue was foreclosed by *United States* v. *Patterson*, 882 F.2d 595 (1st Cir. 1989), cert. denied, 493 U.S. 1027 (1990), which held that the relevant state statute, Mass. Ann. Laws ch. 266, § 16 (Law. Co-op. 1980), defined a predicate crime for purposes of Section 924(e). See Pet. App. 3.

victions" and had not "asserted that it was erroneous for the district court to rely on the presentence report." Pet. App. 7. The court of appeals concluded that the facts set forth in the presentence report "le[ft] no doubt" that petitioner's convictions "ha[d] as an element the use, attempted use, or threatened use of physical force against the person of another," within the meaning of Section 924(e)(2)(B)(i). Pet. App. 8.[4]

ARGUMENT

Petitioner contends that his prior convictions for assault and battery do not qualify as "violent felon[ies]" within the meaning of 18 U.S.C. 924(e)(2)(B), and that his sentence therefore should not have been enhanced. The court of appeals correctly rejected that contention.

This Court concluded in *Taylor* v. *United States*, 495 U.S. 575 (1990), that sentencing courts should generally determine whether a particular offense is a violent felony for purposes of Section 924(e) by examining only "the fact of conviction and the statutory definition of the prior offense." 495 U.S. at 602. The Court indicated, however, that sentencing courts may look beyond those criteria when the statutory definition of the prior offense includes both violent and nonviolent conduct and it is therefore not possible to determine from the fact of conviction whether the prior offense involved violence. *Ibid.* The Court used the example of a state burglary statute that proscribed both breaking into an automobile (which

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[4] The court did not consider petitioner's challenge to the use of the breaking and entering conviction to enhance his sentence, because the two assault and battery convictions, coupled with the robbery conviction, were sufficient to justify the sentence enhancement. Pet. App. 5.

would not constitute a violent felony) and breaking into a building (which would constitute a violent felony). *Ibid.* The Court stated that, in such a case, the sentencing court could properly consult the charging documents and jury instructions to ascertain whether the defendant "was charged only with a burglary of a building," and whether "the jury necessarily had to find an entry of a building to convict." *Ibid.*

As the court of appeals recognized, this case presents a situation in which the sentencing court must look beyond the fact of conviction and the statutory definition of the prior offense to determine whether the prior offense qualifies as a violent felony. Pet. App. 7. In construing the Massachusetts assault and battery statute, the Supreme Judicial Court of Massachusetts has stated that there are two kinds of battery: touchings committed with such violence that bodily harm is likely to result; and nonviolent but offensive touchings that affront the victim's personal integrity. *Commonwealth* v. *Burke*, 457 N.E.2d 622, 624-625 (1983). With respect to the first kind of touching, "consent thereto is immaterial." *Id.* at 624. With respect to nonviolent battery, however, lack of consent is essential, since "an offensive touching is so only because of lack of consent." *Ibid.* Accordingly, under Massachusetts law, assault and battery may be proved by showing that "the touching was physically harmful," that "the touching was "potentially physically harmful," or that "the touching was nonconsensual." *Id.* at 625. Because physically or potentially physically harmful batteries satisfy Section 924(e)'s definition of "violent felony" and offensive nonconsensual batteries do not, it was necessary for the courts below to look beyond the statutory definition to

determine what kind of assault and battery was involved in petitioner's convictions.

Petitioner argues, Pet. 16-17, that sentencing courts should not look beyond the fact of conviction and the statutory definition in cases in which the conviction for a prior offense was based on a guilty plea, because of the unavailability of jury instructions showing that the jury found the element of violence. The courts of appeals have rejected that argument. See, *e.g.*, *United States* v. *Sweeten*, 933 F.2d 765, 771-772 (9th Cir. 1991) (per curiam); *United States* v. *Taylor*, 932 F.2d 703, 708 (8th Cir. 1991); *United States* v. *Garza*, 921 F.2d 59, 61 (5th Cir.), cert. denied, 112 S. Ct. 91 (1991). Such an approach would frustrate Congress's purpose in enhancing the sentences of armed career criminals by precluding the use of prior convictions in many cases in which the convictions resulted from a guilty plea or bench trial. See *Taylor*, 932 F.2d at 708.

Petitioner further argues, Pet. 18-19, that, even if the district court was entitled to look beyond the fact of conviction and the statutory definition, it should not have relied on the information contained in the presentence report. Petitioner failed to argue either at sentencing or on appeal, however, that sentencing courts may not consult the presentence report. See Pet. App. 7. Accordingly, petitioner has waived that claim. In any event, petitioner is mistaken in contending that a sentencing court may consult only the charging papers and jury instructions in determining the character of a prior conviction. Although this Court's decision in *Taylor* referred only to those sources, the decision does not prohibit the use of other documentation, such as a presentence report, that "does not require any searching inquiry into the underlying facts of a defendant's conviction."

Sweeten, 933 F.2d at 769.[5] Here, the presentence report clearly showed, and petitioner did not contest, that petitioner's previous convictions were for violent batteries.[6] Thus, no "searching inquiry" into the underlying facts of those convictions was necessary.

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[5] Petitioner mistakenly relies on *United States* v. *Hendrickson*, 940 F.2d 320 (8th Cir. 1991), as conflicting authority. The court held in that case that an offense constitutes "burglary" within the meaning of Section 924(e)(2)(B)(ii) "if [the] statutory definition [of the offense] substantially corresponds to 'generic' burglary or if the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." 940 F.2d at 324. The *Hendrickson* decision, like *Taylor*, does not address the propriety of consulting documents other than the charging papers and jury instructions to determine if a prior offense could be used for sentence enhancement under Section 924(e).

[6] Petitioner argues, Pet. 18-19, that he lacked notice that the information in the presentence report concerning his prior convictions would be used to enhance his sentence. As the court of appeals explained, Fed. R. Crim. P. 32(c)(2)(A) provided adequate notice. See Pet. App. 7 n.3. That Rule states that the presentence report shall contain information regarding the defendant's "prior criminal record * * * that may be helpful in imposing sentence." In any event, petitioner has not contested the accuracy of the information about his prior convictions contained in the presentence report.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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